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BRIEFS

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Nos. 11-338 and 11-347

In the Supreme Court of the United States

DOUG DECKER, in his official capacity as Oregon State Forester, *et al.*,

Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER, *et al.*,

Respondents.

GEORGIA-PACIFIC WEST, INC., *et al.*,

Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER, *et al.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[*]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It directly represents 300,000 members and indirectly represents the interests of over three million business, trade, and professional organizations of every size, in every sector, and from every region of the country. Over 96% of the Chamber's members are small businesses with 100 or fewer employees. One of the Chamber's primary functions is to represent the interests of its members by filing *amicus* briefs in cases implicating issues of vital concern to American business.

This case presents an important question regarding the jurisdiction of federal courts under the Clean Water Act ("CWA") and other statutes enforced by citizen suit provisions: whether a court hearing a "citizen suit" brought pursuant to the CWA can invalidate an Environmental Protection Agency ("EPA") regulation in the guise of interpreting it. The rule-of-law principles at stake in answering that question are of central importance to the Chamber's members, especially given the frequency with which citizen suit provisions appear in the United States Code. Countless companies have structured important elements of their businesses around the plain text of EPA's Silvicultural Rule (40 C.F.R.

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[*] The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk. In accordance with Rule 37.6, *Amicus* states that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than *Amicus*, its members, and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

§ 122.27(b)(1)), or other, similar agency rules enforced by citizen suit provisions. The profound implications for Chamber members of any decision upending settled regulatory expectations underscore the Chamber's strong interest in ensuring that the Ninth Circuit's decision is carefully examined and appropriately corrected.

SUMMARY OF ARGUMENT

Federal courts are courts of limited jurisdiction. Where Congress has set the bounds of a federal court's power, Article III demands that those bounds be respected. In resolving the case below, however, the Ninth Circuit violated that elementary principle of law by invalidating the EPA's longstanding Silvicultural Rule in the context of adjudicating this citizen suit. Because courts sitting to hear citizen suits enjoy jurisdiction only to *enforce* EPA's rules, not to *invalidate* them, the decision below must be vacated, and the case remanded with instructions to dismiss for lack of subject matter jurisdiction.

Congress enacted two distinct jurisdictional provisions for suits involving EPA's rules implementing the National Pollutant Discharge Elimination System's permitting program. One of the provisions, 33 U.S.C. § 1369(b), gives federal appellate courts exclusive jurisdiction to review the lawfulness of EPA's NPDES rules. *See id.* §§ 1369(b)(1)(E)-(F). In these direct review actions, EPA is a respondent and review generally must be sought within 120 days of a rule's promulgation. *See id.* § 1369(b)(1)(G). By statute, Congress has decreed that review of an NPDES rule can *only* be sought under Section 1369(b)(1). Such a rule "shall not be

subject to judicial review in any civil ... proceeding for enforcement." *Id.* § 1369(b)(2).

The second jurisdictional provision, 33 U.S.C. § 1365(a), allows federal district courts to adjudicate citizen suits. Citizen suits are not subject to Section 1369(b)'s 120-day time limit, and EPA need not be a party to the litigation.

The reason for this marked contrast between Sections 1369(b) and 1365(a) is that the two provisions serve different functions. Section 1369(b) provides for review of the lawfulness of EPA's rules; Section 1365(a) serves to ensure the rules are properly enforced. Accordingly, as this Court unanimously acknowledged in the analogous Clean Air Act ("CAA") context, "an attack on the validity of the regulation ... [cannot] be raised in an enforcement proceeding." *Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 572 (2007).

Here, the Ninth Circuit ignored the line separating these two jurisdictional provisions. No party disputes that the Silvicultural Rule implements EPA's NPDES permitting program. That means that under Section 1369(b)(1), the Silvicultural Rule itself may be reviewed only: (i) in a circuit court; (ii) in a case in which EPA is a respondent; and (iii) if review is timely sought. But not one of those conditions was met in this case. This suit was commenced in district court under Section 1365(a); the EPA was not made a party to the litigation; and this suit was filed decades after the Silvicultural Rule's adoption. The Ninth Circuit thus had jurisdiction only to ensure that the district court properly enforced the Silvicultural Rule—not to examine its lawfulness *vel non*.

Unfortunately, the Ninth Circuit did more than enforce the Silvicultural Rule; it invalidated it. Specifically, the Ninth Circuit held that "runoff from logging roads that [is] collected in a system of ditches, culverts, and channels" requires an NPDES permit. *Nw. Envtl. Def. Ctr. v. Brown*, 640 F.3d 1063, 1079-80 (9th Cir. 2011). The Rule, however, says the opposite—that "site preparation," "surface drainage," and "road construction and maintenance" are all activities that do *not* require a permit. 40 C.F.R. § 122.27(b)(1). Because the Silvicultural Rule is unambiguous, not even EPA has discretion to read it any other way.

The dispositive issue for this case thus does not involve the scope of EPA's authority but the entirely distinct question of the scope of the district court's jurisdiction to review—and potentially to invalidate—EPA regulations. The point here is that Congress withheld from the district courts any jurisdiction to review or revise the Silvicultural Rule when adjudicating citizen suits. The Ninth Circuit's decision to the contrary dispenses with the Clean Water Act's jurisdictional limitations; discards Congress's carefully drawn review regime; gives district courts review authority that they have heretofore lacked; and upsets the stability of comparable rules and review provisions. If allowed to stand, the Ninth Circuit decision would subject countless Chamber members and other regulated parties to new degrees of legal uncertainty across the entire swath of the Code of Federal Regulations provisions that are subject to enforcement via citizen suits. To restore certainty to the operation of the Clean Water Act and similar statutory regimes, the Ninth Circuit's decision should be vacated and the

case remanded with instructions to dismiss for want of subject matter jurisdiction.

ARGUMENT

The Ninth Circuit's "invalidation by interpretation" approach has serious consequences for the stability of settled regulatory understandings under the NPDES permitting regime and other regulatory regimes enforced by citizen suits. The Ninth Circuit's wholesale willingness to replace congressional limitations on when, where, and how regulations may be challenged with an uncertain regime in which courts may invalidate regulations long after their promulgation and through sleight of hand can only undermine the stability of the law. The Chamber's members have strong interests in ensuring that all regulated parties play on an even field defined by settled rules of the road for seeking judicial review of agency enactments. Only through adherence to such settled rules will judicial review determinations be orderly, predictable, and capable of allowing businesses to responsibly plan their affairs.

The decision below deprives regulated parties throughout the Ninth Circuit of these most basic and essential rule-of-law benefits. The Silvicultural Rule is unambiguous: no NPDES permit is required for ditches and culverts that drain water off the surface of logging roads. Nonetheless, the Ninth Circuit declined to give the Rule the only reading its text reasonably permits. The Ninth Circuit's decision thus discarded core limitations on review of agency action and deprived Chamber members of the benefits of the previously settled understanding of the Silvicultural Rule and other similar rules.

I. COURTS ADJUDICATING CITIZEN SUITS UNDER THE CLEAN WATER ACT LACK JURISDICTION TO INVALIDATE AGENCY RULES.

Congress has limited how, when, and where review of EPA rules implementing the NPDES permitting program can be obtained.

Under the CWA, review of an NPDES rule can be had "in the Circuit Court of Appeals of the United States for the Federal judicial district in which [the applicant] resides or transacts business," and "within 120 days ... or after such date only if such application is based solely on grounds which arose after such 120th day." 33 U.S.C. § 1369(b)(1); *see also NRDC v. EPA*, 571 F.3d 1245, 1269 (D.C. Cir. 2009) ("[Under the CAA, t]he triggering date was July 2, 1979, when the EPA .... unequivocally asserted its authority to exempt new sources from permitting requirements under section VI. Thus, the petitioners' challenge to such authority in this case comes almost thirty years late and we are precluded from considering it.").

Congress left no doubt that judicial review of EPA rulemakings under Section 1369(b) is exclusive: "Action of the Administrator with respect to which review could have been obtained under paragraph (1) of this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement." 33 U.S.C. § 1369(b)(2); *see also Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 14 (1981) ("Where review could have been obtained under this provision, the action at issue may not be challenged in any subsequent civil or criminal proceeding for

enforcement.") (citing 33 U.S.C. § 1369(b)(2)); *Paper Inst., Inc. v. EPA*, 882 F.2d 287, 288 (7th Cir. 1989) ("Because the [CWA] bars review in enforcement proceedings of actions that could have been reviewed earlier, 33 U.S.C. § 1369(b)(2), careful lawyers must apply for judicial review of anything remotely resembling a reviewable order."). As a result, subject to due process limitations, "any agency action that was reviewable in the courts of appeals *cannot be challenged in an enforcement proceeding*, whether or not review was actually sought." *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 605 (1980) (emphasis added).

Relatedly, federal district courts' jurisdiction to entertain citizen suits is also carefully circumscribed by statute. Section 1365(a) of the Clean Water Act provides that district courts enjoy jurisdiction only "to enforce ... an effluent standard," not to adjudicate whether a standard is lawful. 33 U.S.C. § 1365(a); *see also Maier v. EPA*, 114 F.3d 1032, 1036-39 (10th Cir. 1997) (explaining that Section 1365(a) cannot be used to challenge a rule's validity).

As this Court has explained in a criminal prosecution under the CAA:

> The narrow inquiry to be addressed by the court ... is not whether the Administrator has complied with appropriate procedures in promulgating the regulation in question, or whether the particular regulation is arbitrary, capricious, or supported by the administrative record. Nor is the court to pursue any of the other familiar inquiries which arise in the

> course of an administrative review proceeding.

Adamo Wrecking Co. v. United States, 434 U.S. 275, 285 (1978); *see also United States v. Ethyl Corp.*, 761 F.2d 1153, 1157 (5th Cir. 1985) (applying *Adamo Wrecking Co.* in the civil context).

Congress' decision to cabin the scope of citizen suits in the Clean Water Act and other statutes is understandable, both as a matter of prudence and as a matter of constitutional principle. As members of the Court have remarked, private enforcement of public law raises "[d]ifficult and fundamental questions ... in view of the responsibilities committed to the Executive by Article II of the Constitution of the United States." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 197 (2000) (Kennedy, J., concurring); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576-77 (1992) (holding in a citizen suit case that Congress could not allow private prosecution of any and all violations of federal law because that would infringe on "the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed,' Art. II, § 3"). If read too broadly, citizen suit provisions could enable every court of competent jurisdiction to dip its own interpretive oar into agencies' most important regulatory waters—thus undermining the uniformity, predictability and even legitimacy of the resulting administrative regimes.

In short, Congress clearly and wisely established Section 1369(b) as the exclusive vehicle for obtaining judicial review of EPA regulations, while establishing Section 1365(a) citizen suits as a vehicle

for enforcing—but not for reviewing—such regulations.

II. THE LINE BETWEEN "INVALIDATING" A RULE AND "INTERPRETING" IT MUST BE DILIGENTLY ENFORCED.

Against the backdrop of these different review provisions, the line between "invalidating" a rule and "enforcing" it must be diligently policed. Most importantly, the judicial inquiry into the distinction between a rule's enforcement and its invalidation must go beyond mere labels.

As the Court has recognized, provisions for funneling challenges to rulemakings quickly into court serve important functions. So long as they are interpreted consistent with due process, such provisions, including Section 1369(b)(2) of the CWA, properly ensure that regulations are "uniformly applied" and "quickly reviewed by a single court intimately familiar with administrative procedures." *Adamo Wrecking Co.*, 434 U.S. at 284.

Indeed, as the United States' briefing explained in *Duke Energy*, such provisions "avoid[] inconsistent results and forum shopping, provide[] speedy and authoritative review in a court of appeals with particular expertise in the relevant area, and ensure[] that regulated entities are treated consistently throughout the country, thus ensuring a level playing field for the regulated community." Brief for the United States as Respondent Supporting Petitioners, *Duke Energy*, 549 U.S. 561 (No. 05-848) (2006 WL 2066660) (July 21, 2006), at 18 (citing *Harrison*, 446 U.S. at 593; *NRDC v. EPA*, 512 F.2d 1351, 1356-57 (D.C. Cir. 1975); *Lubrizol Corp. v. Train*, 547 F.2d 310, 317 (6th Cir. 1976)).

Accordingly, any failure to police the line between "invalidation" and "interpretation" of a rule would unsettle doctrine far beyond the boundaries of this case—and create confusion in the application of timing, exclusive jurisdiction, and remedial rules in a variety of administrative law contexts.

In particular, failing to police this jurisdictional line would subject Chamber members to challenges to agency rulemakings and orders brought long after the end of the specified review period. Importantly, the Clean Water Act is by no means alone in establishing comparatively short deadlines for judicial review of agency rulemakings. *See, e.g.*, 47 U.S.C. § 402(b) (Federal Communications Commission: 30 days); 42 U.S.C. § 7607(b) (CAA: 60 days); 42 U.S.C. § 300j-7(a) (Safe Drinking Water Act: 45 days); 42 U.S.C. § 6976(a)(1) (Resource Conservation and Recovery Act: 90 days); 30 U.S.C. § 1276(a)(1) (Surface Mining Control and Reclamation Act: 60 days); 28 U.S.C. §§ 2342, 2344 (numerous agencies including Atomic Energy Commission, Surface Transportation Board, and Federal Maritime Commission: 60 days).

Like statutes of limitations, such judicial review deadlines often serve to bar litigation of the merits of otherwise valid legal challenges. *See, e.g.*, *United States v. Kubrick*, 444 U.S. 111, 125 (1979) ("It goes without saying that statutes of limitations often make it impossible to enforce what were otherwise perfectly valid claims. But that is their very purpose ...."). The larger point, however, is that Congress weighed the costs and benefits of time-barring otherwise meritorious claims against the costs and benefits of creating stability and certainly in a

particular regulatory regime. *Cf., Adamo Wrecking Co.*, 434 U.S. at 284 (explaining that Congress intended rulemakings in the environmental context to be "quickly reviewed by a single court intimately familiar with administrative procedures"). The balance struck by Congress in these provisions creates clear, well-defined avenues for bringing challenges to regulations, while permitting regulated parties to know the rules and plan their businesses accordingly.

Citizen suit provisions, by very nature, divide the authority to promulgate rules from the authority to enforce them in ways that threaten to undermine statutorily specified judicial-review windows. Outside the citizen suit context, the promulgator and enforcer of agency regulations is typically one and the same entity—the agency itself. In those circumstances, if an agency comes to question the wisdom of its own regulations, all it need do is take proper steps to amend them. Under citizen suit provisions, by contrast, private citizens, as agency outsiders, are authorized to enforce but not to amend agency regulations. This partial authority often leads to situations where these outside enforcers find they may enforce but may not challenge regulations with which they fundamentally disagree.

The bottom line is that, under any regime like the Clean Water Act, the coupling of a short window for review with a perpetual opportunity for private enforcement sorely tempts citizen litigants to dress up time-barred challenges to the validity of regulations as permissible actions seeking to enforce them. These incentives to engage in a sleight of hand (which, as explained below, are nicely

exemplified by the proceedings in this case) are precisely why a too-expansive compass for citizen suits undermines statutory review deadlines, unsettles the law, and upsets the well founded expectations of the business community.

In addition to specifying short time windows for challenging agency rulemakings, Congress also often provides that review of rulemakings occurs exclusively in particular courts, such as the courts of appeal. *See, e.g.*, 28 U.S.C. § 2343 ("The venue of a proceeding under this chapter is in the judicial circuit in which the petitioner resides or has its principal office, or in the United States Court of Appeals for the District of Columbia Circuit.") (applying to review of orders of agencies listed in 28 U.S.C. § 2342). Because of the "institutional differences between trial and appellate courts," Congress's express statement "as to the particular type of court it wants to review agency action, ... should not be set aside lightly." *NetworkIP, LLC v. FCC*, 548 F.3d 116, 121 (D.C. Cir. 2008); *Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70, 78 (D.C. Cir. 1984) ("Appellate courts develop an expertise concerning the agencies assigned them for review. Exclusive jurisdiction promotes judicial economy and fairness to the litigants by taking advantage of that expertise. In addition, exclusive jurisdiction eliminates duplicative and potentially conflicting review, and the delay and expense incidental thereto.") (citation omitted).

Citizen suits by contrast are brought almost uniformly in the district courts. *See Laidlaw*, 528 U.S. at 173; *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 88 (1998). Allowing parties to challenge

the NPDES regulations and similar agency rules through citizen suits would mean that district courts, not appellate courts, would evaluate the lawfulness of such rules in the first instance—contrary to Congress's entrustment of such review to the courts of appeal. *See, e.g.*, 33 U.S.C. §§ 1369(b)(1)-(b)(2). In view of the heavy reliance of regulated parties on the special review competence of appellate courts, there is no reason to think that Congress intended to permit forum substitutions in cases involving challenges to agency rulemakings under the Clean Water Act and other statutory regimes that involve regulatory enforcement through citizen suits.

Finally, in ordinary administrative law cases, if a court invalidates a rule, it typically vacates the rule and remands to the agency for further proceedings. *See, e.g., Comcast Corp. v. FCC*, 579 F.3d 1, 9 (D.C. Cir. 2009) ("[W]e have not hesitated to vacate a rule when the agency has not responded to empirical data or to an argument inconsistent with its conclusion."); *see also id.* at 10 (Randolph, J., concurring) (arguing that "whenever a reviewing court finds an administrative rule or order unlawful, the Administrative Procedure Act requires the court to vacate the agency's action"). Under this common procedure, regulated parties like Chamber members receive an opportunity to submit a new round of comments in connection with the agency remand and obtain the benefit of orderly, transparent agency decisionmaking in the wake of the instigating judicial review decision.

By contrast, invalidation-by-interpretation review acts to short-circuit and muddy up the typical agency remand process. In response to such an invalidation,

an agency may well choose to retain the federal court's rewriting of the regulation or to reject it—at least outside the circuit in which the review decision was issued. Such an outcome would greatly prejudice regulated parties by undermining the regularity of administrative practice, the uniformity of agency regulations, and the statutory review scheme enacted by Congress.

III. THE NINTH CIRCUIT EXCEEDED ITS JURISDICTION BY INVALIDATING THE SILVICULTURAL RULE IN THIS CITIZEN SUIT.

Here, the Ninth Circuit claimed only to enforce EPA's regulation and not to invalidate it. But a simple examination of the Rule, perusal of the Ninth Circuit opinion, and comparison between the Rule's operation before and after the Ninth Circuit's review decision shows without doubt that the Rule has been nullified.

A. The Silvicultural Rule Unambiguously Exempts Logging Ditches And Culverts From NPDES Permitting Requirements.

The Silvicultural Rule distinguishes between "[s]ilvicultural point sources," which are "subject to the NPDES permit program," 40 C.F.R. § 122.27(a), and "non-point source silvicultural activities," which do not require an NPDES permit, *id.* § 122.27(b)(1).

Specifically, the rule provides in relevant part:

> **(a) Permit requirement.** Silvicultural point sources, as defined in this section, are point sources subject to the NPDES permit program.

> **(b) Definitions.** (1) Silvicultural point source means any discernible, confined and discrete conveyance related to rock crushing, gravel washing, log sorting, or log storage facilities which are operated in connection with silvicultural activities and from which pollutants are discharged into waters of the United States. The term does not include non-point source silvicultural activities *such as* nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, or road construction and maintenance from which there is natural runoff.

Id. §§ 122.27(a)-(b)(1) (emphasis added).

In three ways, the Rule establishes that ditches and culverts draining water from logging roads "operated in connection with silvicultural activities" do not qualify as point sources and are hence exempt from NPDES permitting requirements.

First, the Rule expressly defines the scope of a "silvicultural point source" in a manner that does not include drainage ditches and culverts for roads. Under the Rule, a "discernible, confined and discrete conveyance[]"—such as a ditch or culvert—is a "silvicultural point source" subject to a permit requirement *only* if it is "related to rock crushing, gravel washing, log sorting, or log storage facilities." By implication, conveyances *not* "related to rock crushing, gravel washing, log sorting, or log storage facilities" are *not* "point sources subject to the

NPDES permit program." *See, e.g.*, *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (applying the *expressio unius* canon). The Rule thus expressly defines the scope of silvicultural point sources in a way that excludes ditches and culverts made for logging roads.

Second, ditches and culverts for logging roads fall within the scope of the Rule's express NPDES permit exemption for certain categories of conduct dubbed "non-point source silvicultural activities." These exempted activities include, *inter alia*, "site preparation, ... surface drainage, [and] road construction and maintenance from which there is natural runoff."

Given the reality of silvicultural operations, the codified exemptions for "site preparation," "surface drainage," and "road construction and maintenance from which there is natural runoff" necessarily exempt from NPDES permitting all water management activities associated with rainwater runoff from logging roads—such as the use of ditches, culverts, and the like. Since at least the time of the Romans, road builders have recognized that well-functioning roads require that rainwater be drained away from road surfaces and into drainage ditches. *See, e.g.*, R. STACCIOLI, THE ROADS OF THE ROMANS 108 (2003) ("[T]he top surface of the roadway was normally curved or slightly pitched to allow rainwater to flow toward the drainage ditches on the sides and to prevent it from stagnating."). This drainage requires channeling rainwater away from roads and nearby areas. Hence, under most topographical conditions, it is practically impossible

to build well-constructed logging roads without also building accompanying ditches and culverts.

Accordingly, part of properly constructing and maintaining logging roads is properly constructing and maintaining ditches and culverts to ensure that the roads' inevitable periodic inundation does not cause a wash out—a fact that the United States itself recognized before the District Court in this litigation. *See* U.S. *Amicus* Brief, *Nw. Envtl. Def. Ctr. v. Brown*, No. 3:06 CV-01270, at 16-17 (D. Or. filed Dec. 6, 2006) ["U.S. D.Ct. Br."] ("NECD's interpretation of section 122.27 ignores the plain language of the regulation. The regulation refers to 'road construction and maintenance.' It is practically impossible to construct and maintain a road without including systems for the control of precipitation through ditches, culverts and the like. Otherwise, the roads would wash out. These structures are an integral part of forest roads and reading them as outside the scope of the regulation does not make sense because it defeats the plain language of the regulation.").

Simply put, if building logging-road ditches always required NPDES permits, then building logging roads themselves would practically always require such permits, because the latter can almost never be properly constructed without the former. Under that assumption, the Silvicultural Rule's express exemption for logging road "construction and maintenance" would be rendered largely meaningless. *See* U.S. D.Ct. *Amicus* Br. at 16 (accepting NEDC's "interpretation would render the second sentence of the rule superfluous"). That surely is no way to read a regulation. *See, e.g.*, *Nat'l*

Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 669 (2007) (rejecting "reading [that] would render the regulation entirely superfluous").

Third, even assuming that the Silvicultural Rule's references to "site preparation," "surface drainage," and "road construction and maintenance" were not sufficient, of themselves, to capture logging-road ditches, the Rule's listing of exempted activities is notably non-exhaustive. The Silvicultural Rule expressly provides that other activities "such as" the listed activities are exempted from NPDES permitting requirements. Indeed, the use of a phrase like "such as" to introduce the non-exclusive list of non-point sources is particularly notable in light of the use of an exclusive list to define "silvicultural point sources." Given that ditches and culverts are part and parcel of preparing sites, draining surfaces, and constructing and maintaining roads, drainage from these structures must also be included within the category of "non-point source silvicultural activities." Having adopted a non-exhaustive list of exempted activities, EPA may not give the Silvicultural Rule so narrow a reading that the rule no longer accomplishes its evident purposes.

The upshot is that, even leaving aside the fact that EPA has always said that the Silvicultural Rule exempts ditches that direct runoff away from logging roads—thus precluding EPA from claiming deference for an interpretive reversal at this late date—the Rule itself leaves no doubt as to its meaning.

B. EPA Cannot Read The Silvicultural Rule To Mean Something Other Than What Its Plain Text Says.

Given the foregoing, it is apparent that even EPA has no discretion to read the Silvicultural Rule as the Ninth Circuit did. *See, e.g.*, *Christensen v. Harris Cnty.*, 529 U.S. 576, 588 (2000) ("*Auer* deference is warranted only when the language of the regulation is ambiguous.") (citing *Auer v. Robbins*, 519 U.S. 452, 461 (1997)). Here, as in *Christensen*, to "defer to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." 529 U.S. at 588.

Nonetheless, at the petition stage, the United States refused to acknowledge that the Silvicultural Rule always unambiguously exempted logging-road ditches and culverts. Instead, the United States argued that the Silvicultural Rule *is* ambiguous, but that EPA's position as articulated in its *amicus* brief is entitled to deference as to the Rule's interpretation. *See* CVSG Brief at 12. While the United States ultimately reaches the correct outcome—that the Ninth Circuit erred—its analysis is plainly wrong. Contrary to the United States' current position, the Silvicultural Rule contains no ambiguity.

The United States' characterization of the Silvicultural Rule as ambiguous deserves no deference. At the outset, the question whether a statute or regulation is ambiguous is for this Court to decide. "An agency is given no deference at all on the question whether a statute is ambiguous ...." *Cajun Elec. Power Coop., Inc. v. FERC*, 924 F.2d 1132, 1136 (D.C. Cir. 1991) (Silberman, J., joined by

Ginsburg, R.B., J., and Thomas, J.); *see also Old Dominion Elec. Coop., Inc. v. FERC*, 518 F.3d 43, 48 (D.C. Cir. 2008) (same); *Wells Fargo Bank, N.A. v. FDIC*, 310 F.3d 202, 205-06 (D.C. Cir. 2002) (same); *see generally Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) ("If, however, *the court determines* Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute ....") (emphasis added).

No less importantly, the United States' shifting positions in this litigation undermine any agency deference that the EPA might otherwise be entitled to claim. *See Christopher v. Smithkline Beecham Corp.*, 132 S. Ct. 2156, 2167-68 (2012) (refusing to defer to an interpretation that upended a "longstanding practice"); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446, n.30 (1987) (refusing to defer to an interpretation due to "the inconsistency of the positions the [agency] has taken").

Before the district court, EPA argued, in addition to a call for deference, that the Silvicultural Rule's "language" is "plain" and that the "validity" of the rule could not be litigated in a "citizen suit." U.S. D.Ct. Br. at 10; *see also id.* at 16-17 ("[R]eading [ditches, culverts and the like] as outside the scope of the regulation does not make sense because it defeats the plain language of the regulation."). In the Ninth Circuit, the United States initially took the same position: the Silvicultural Rule exempts logging-road ditches from NPDES permitting requirements; any challenge to the Rule is jurisdictionally barred; and, in any event, the EPA is entitled to deference. *See* JA Vol. I at 27 ("This rule

categorically defines stormwater runoff from forest roads and harvesting activities as nonpoint sources."); JA Vol. I at 28 ("NEDC, having not challenged the silvicultural rule within the time frame provided by the statute, cannot now challenge the rule some thirty years later.") (discussing 33 U.S.C. § 1369(b)); JA Vol. I at 29 ("Should this Court nevertheless consider NEDC's improper and untimely challenge, this Court should defer to EPA's reasonable interpretation of the CWA to not require regulation of stormwater runoff from forest roads as point sources.").

Only in its 2011 Ninth Circuit brief in response to the panel's questions did the government perform its pirouette. In that brief, not only did the United States newly seek to concede all jurisdictional objections, it also dropped any argument that the Silvicultural Rule's text is plain. Instead, the government solely argued that the rule is ambiguous but that the Ninth Circuit should have deferred to the EPA's interpretation of it. *See* JA Vol. I at 53 ("Where EPA promulgates an ambiguous regulation and (as here) subsequently offers an interpretation of that regulation in an *amicus* brief, that interpretation is entitled to a high level of deference under *Auer* ...."). The government repeated this newly minted position in its *certiorari* briefing. *See, e.g.*, CVSG Br. at 12.

This Court has recognized that agencies face perverse incentives propelling them toward crafting ambiguous rules when they are asked—as they are every day—to implement statutes through regulations. *See Smithkline Beecham*, 132 S. Ct. at 2168 ("Our practice of deferring to an agency's

interpretation of its own ambiguous regulations undoubtedly has important advantages, but this practice also creates a risk that agencies will promulgate vague and open-ended regulations that they can later interpret as they see fit, thereby 'frustrat[ing] the notice and predictability purposes of rulemaking.'") (quoting *Talk Am., Inc. v. Michigan Bell Tel. Co.*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring)).

This case illustrates a related danger. Even where a regulation itself is not ambiguous, an agency might well strain to manufacture a false, *post hoc* ambiguity and thereby create administrative flexibility that allows the agency to dispense with notice and comment before effecting regulatory changes. We see here just such a tidy morality play. In the proceedings below, the EPA first nobly resisted and then meanly succumbed to the omnipresent temptation to claim regulatory ambiguity and the additional degrees of interpretive freedom that accompany it. The Court should see the agency's course of action for what it is—and respond by ensuring that such efforts to manufacture artificial ambiguity are not rewarded.

C. The Ninth Circuit's "Interpretation" Of The Silvicultural Rule In Fact Invalidates The Rule.

As this Court unanimously recognized in *Duke Energy*, a party cannot "attack ... the validity of [a] regulation ... in an enforcement proceeding." 549 U.S. at 572. *Duke Energy* remanded the Fourth Circuit decision then under consideration, because that decision could "only be seen as an implicit declaration that the PSD regulations were invalid as

written." *Id.* at 573. While "no precise line runs between a purposeful but permissible reading of the regulation adopted to bring it into harmony with the [enforcing court's] view of the statute, and a determination that the regulation as written is invalid," there are cases, such as *Duke Energy*, where the only way to describe what the court has done is invalidation. *Id.*

A careful review of the Ninth Circuit's opinion below confirms that here, as in *Duke Energy*, the Court of Appeals outright invalidated the agency rule at issue. To be sure, the Ninth Circuit attempted to walk an interpretive tightrope by drawing a fine distinction between direct runoff from logging roads—which concededly does not constitute a point source—and logging-road runoff "channeled and controlled through a 'discernible, confined and discrete conveyance' in a system of ditches, culverts, and channels." *Nw. Envtl. Def. Ctr.*, 640 F.3d at 1079. According to the Ninth Circuit, "challenged and controlled" runoff, in contrast to direct runoff, does constitute a point source. *See id.* But this proffered distinction, aside from its novelty, runs headlong into the Silvicultural Rule's text. It results in a rule that means something fundamentally different from what the Rule plainly says.

The ultimate, and acknowledged, rationale for the Ninth Circuit's reading of the Rule was the court's belief that the Clean Water Act mandates the tenuous distinction it found itself attempting to draw. To its credit, the Ninth Circuit forthrightly acknowledged that its "interpretation" of the Rule "does not reflect the intent of EPA." The Ninth Circuit nonetheless adopted this "interpretation" out

of a belief that EPA's regulation, as written, was an invalid application of the statute. *See, e.g., id.* at 1080 ("[T]here are two possible readings of the Silvicultural Rule. The first reading reflects the intent of EPA in adopting the Rule. Under this reading, the Rule exempts all natural runoff from silvicultural activities ... irrespective of whether, and the manner in which, the runoff is collected, channeled, and discharged into protected water. If the Rule is read in this fashion, it is inconsistent with § 502(14) *and is, to that extent, invalid.* The second reading *does not reflect the intent of EPA*, but would allow us to construe the Rule to be consistent with the statute.") (emphasis added).

Remarkably, the Ninth Circuit also acknowledged that its judgment would require the EPA—not even a direct party to the case—to act affirmatively to create a new NPDES "permitting process" for silvicultural activities. According to the Ninth Circuit:

> Until now, EPA has acted on the assumption that NPDES permits are not required for discharges of pollutants from ditches, culverts, and channels that collect stormwater runoff from logging roads. EPA has therefore not had occasion to establish a permitting process for such discharges. But we are confident, given the closely analogous NPDES permitting process for stormwater runoff from other kinds of roads, that EPA will be able to do so effectively and relatively expeditiously.

Id. at 1087.

While becoming in its own way, the Ninth Circuit's candor is fatal to the viability of its decision. A decision premised on the rejection of "the intent of EPA" and requiring the creation of a brand new EPA "permitting process" can hardly be said to be enforcing—as opposed to invalidating—a preexisting EPA regime that lacks such a process.

There is at the end of the day no way to read the Ninth Circuit's decision other than as invalidating the Silvicultural Rule. The judgment below is therefore *ultra vires* and should be vacated. *See Duke Energy*, 549 U.S. at 573; 33 U.S.C. §§ 1369(b)(1)-(b)(2).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be vacated and the case remanded with instructions to dismiss for want of subject matter jurisdiction.

Respectfully submitted,

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